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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1618 OF 2006

IN

SUIT NO.3207 OF 1986

M/s.Gupta Soap (Regd.)).. Plaintiffs

Versus

M/s.I.V.P. Limited).. Defendants

Mr.A.Delhiwala i/b.G.T. Kukreja for the Plaintiffs.

Mr.Cyrus Ardeshir i/b.Joy Legal Consultants for the Defendants.

CORAM : SMT. NISHITA MHATRE, J.

DATED : 3RD JULY 2006

P.C.:

1. The present Motion has been taken out for setting aside the order dated 24th February 2006 decreeing the suit, ex-parte. The Defendants have sought restoration of the Suit to file and permission to place on record their Written Statement. According to the Defendants, they have been directed to pay the Plaintiff a sum of Rs.1,97,407.42 with interest at the rate of 12% per annum from the date of filing of the Suit till payment.

2. While decreeing the suit, the learned Judge has observed as follows :-

"3. The present suit is filed for the

recovery of the amount because according to the plaintiffs the said amount has been refunded by authorities and authorities have communicated to the defendants by letter dt.27.10.83 that the said amount has been paid to the defendants. The said letter is produced at Ex.E to the plaint. Plaintiffs have also produced original documents. The same are taken on record and marked Ex.A collectively. Defendants are served. Defendants have filed Vakalatnama. However, none appeared for the defendants when the matter was on board on 23.2.06. Today also when the matter is kept for ex-parte decree, none appears for the defendants. There is no written statement filed by the defendants. In the light of the aforesaid, there shall be decree in favour of the plaintiffs and against the defendants in terms of prayer clause (a) with further interest thereon @ 12% simple interest from the date of suit till payment and/or realisation. Suit disposed of. Refund of court fee as per rules."

3. The Defendants submit that this is an order passed under Order 9 Rule 13 of the Civil Procedure Code and, therefore, they are entitled to maintain the present Motion for setting aside the decree. According to the Defendants, they had engaged a firm of Advocates in the year 1986. That firm of Advocates came to be dissolved. The Defendants were not aware of the same and were, therefore, not aware when the matter came up for hearing on 24th February 2006. They learnt of the decree having been passed and engaged another Advocate to take appropriate steps in the matter. The Defendants have contended in the affidavit in support of the Motion that they have a good case on merits and, therefore, the ex-parte decree be set aside.

4. On behalf of the Plaintiffs, it is submitted

that the decree had been passed for want of written statement and no Motion can be filed for setting aside such a decree. It is submitted that, in view of the judgment of the Division Bench of this Court in the case of *Dhanwantraï R. Joshi and others vs. Satish J. Dave and others*, **1998 (4) ALL MR 509**, the Defendants would have to file an Appeal. The decree has been passed under Order 8 Rule 5 and not under Order 9 Rule 6. Therefore an application for setting aside the order under Order 9 Rule 13 is not maintainable.

5. The Division Bench in the aforesaid judgment considered the various divergent views taken by the learned Single Judges of this Court and has held that an application under Order 9 Rule 13 is not maintainable when the Court has passed a decree under Order 8 Rule 5 or Rule 10 of the Civil Procedure Code. It has been held that Order 8 does not permit filing of an application for setting aside a decree passed for non-filing of the written statement. The only remedy in such a case is to file an appeal. The Court has observed that the word "ex-parte" has a specific connotation. If the Defendant fails to appear when the Suit is called for hearing and if it is proved that the summons was duly served on the Defendant, the Court can then proceed with the Suit ex-parte and pass a decree.

6. In the present case, there is no doubt that the Defendants were served. However, when the Suit was

called out for hearing, they were not present or represented by their Advocates. Obviously, therefore, the decree which has been passed is under Order 9 Rule 13. In my view, the Plaintiffs' submission cannot be accepted. The learned Judge has recorded while passing the decree on 24th February 2006 that the Defendants had filed their Vakalatnama and that nobody appeared for them on 23rd February 2006 and again on 24th February 2006 when the matter was kept for an ex-parte decree.

7. Therefore, in my view, Notice of Motion must be allowed on the following terms and conditions :-

- (a) Defendants to deposit an amount of Rs.2,00,000/- (Rupees Two Lakhs only) in this Court within four weeks from today.
- (b) In the event the Defendants deposit the amount as aforesaid, Prothonotary & Senior Master to invest the same in a fixed deposit of a Nationalised Bank initially for a period of three years to be renewed thereafter till the disposal of the Suit.

8. Notice of Motion made absolute in terms of prayer clauses (a) and (b).

9. Written Statement to be filed within two weeks.